Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of Part 90 of the Rules to Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Service	)	PR Docket No. 89-552 RM-8506
	)	
Implementation of Sections 3(n) and 332 of the Communications Act	)	GN Docket No. 93-252
	)	
Regulatory Treatment of Mobile Services	)	
	)	
Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, 220-222 MHz	)	PP Docket No. 93-253

REPLY COMMENTS OF PAGING NETWORK, INC.

Respectfully submitted,

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October 12, 1995

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SUMMARY

PageNet wholeheartedly supports the Commission's efforts to create an appropriate regulatory framework that will allow 220 MHz licensees to effectively compete in the already competitive CMRS marketplace. PageNet generally supports the Commission's proposals, in particular, (a) the proposed geographic licensing framework, (b) the use of competitive bidding for Phase II licensing and, consequently, the return of pending noncommercial nationwide channels, (c) the elimination of set-asides for noncommercial channels, (d) the proposed three ten-channel block allocations, and (e) the elimination of any restrictions on aggregation, the number of 220 MHz authorizations, and the provision of fixed and paging operations.

The Commission is authorized under the Communications Act, as amended, as well as under a long line of precedents, to modify the rules that currently apply to 220 MHz service and appropriately apply them to existing licensees and pending applicants. Pursuant to persuasive Commission precedents, it is within the province of the Commission to dismiss and return all pending applications that have become inconsistent with the modified rules, and establish a new filing window for all applicants. Similarly, the Commission has the authority under the Budget Act and the Communications Act, as amended, to award the remaining spectrum through a system of competitive bidding. Any other means of distributing the available spectrum would be in direct contravention of the applicable statutes, as well as the over-arching legislative intent of the Budget Act.

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REPLY COMMENTS OF PAGING NETWORK, INC.

Paging Network, Inc. ("PageNet"), by and through its attorneys, hereby submits its reply comments in response to the Federal Communications Commission's (the "Commission") Third NPRM in this proceeding.[1] As discussed in greater detail below, PageNet continues to support the Commission's proposal to revise

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1 In the Matter of Amendment of Part 90 of the Commission's Rules to Provide for the Use of 220-222 MHz Band by the Private Land Mobile Radio Service; Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services; Implementation of Section 309(j) of the Communications Act--Competitive Bidding, 220-222 MHz, Second Memorandum Opinion and Order and Third Notice of Proposed Rulemaking, PR Docket No. 89-552, RM-8506, GN Docket No. 93-252, PP Docket No. 93-253, FCC 95-312 (1995) ("Third NPRM").

the rules applicable to 220 MHz service, as well as to distribute the available nationwide noncommercial spectrum via competitive bidding.

I. INTRODUCTION

In the Third NPRM, the Commission has proposed a new framework for the operation and licensing of the 220-222 MHz band ("220 MHz Service") as part of its continuing implementation of the new regulatory framework for mobile radio services. Among other things, the Commission proposed to retain the distinction between nationwide and non-nationwide 220-222 MHz channels in order to make a variety of services available to the public. With respect to nationwide noncommercial channels, the Commission sought comments on whether to resolve pending mutually exclusive, noncommercial nationwide applications by lottery, comparative hearing, or to return the applications and adopt a new licensing scheme for the thirty channels which are the subject of the applications. In the event the Commission returns the applications, the Commission proposed to license the thirty channels on a nationwide basis to all applicants that intend to use the channels for commercial services as well as applicants that intend to use the channels for private, internal use. The Commission also proposed to assign these channels in the form of three ten-channel authorizations.

The Commission also proposed modifications to its existing rules which would, inter alia, allow fixed and paging operations for all 220 MHz licensees without the requirement that such use be

on an ancillary basis to land mobile operations, as well as to allow licensees, under certain conditions, to aggregate all their authorized channels to operate on channels wider than 5 KHz.

In PageNet's Comments, PageNet generally supported the Commission's proposed regulatory framework. In particular, PageNet supported, inter alia, (a) the proposed geographic licensing framework, (b) the use of competitive bidding for Phase II licensing and, consequently, the return of pending noncommercial nationwide applications, (c) the elimination of set-asides for noncommercial channels, (d) the proposed three ten-channel block allocations, and (e) the elimination of any restrictions on aggregation, the number of 220 MHz authorizations, and the provision of fixed and paging operations.

II. THE COMMISSION SHOULD RETURN ALL PENDING NONCOMMERCIAL NATIONWIDE APPLICATIONS AND IMPLEMENT COMPETITIVE BIDDING TO RESOLVE MUTUALLY EXCLUSIVE APPLICATIONS.

The majority of the commenters in this proceeding focused largely on the Commission's competitive bidding proposal.[2] A number of commenters argue against the return of pending applications and the adoption of competitive bidding to distribute the remaining channels. In general, these commenters challenge the Commission's authority to institute competitive bidding.

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2 See, e.g., Comments of PLMRS Narrowband, Corp.; Comments of Columbia Cellular Corporation; Comments of UTC; Comments of 360 Mobile Data Joint Venture. It is unclear how many of the commenters are pending applicants, but based on the number of comments submitted, it is obvious that not all of the pending applicants were interested enough to file comments.

Moreover, they assert that the inequities and harm that accordingly would accrue to pending applicants militate against competitive bidding. As more fully discussed below, these assertions have no basis in law and in fact.

A. The Omnibus Budget Reconciliation Act Compels the Commission to Auction the Available Spectrum.

The Omnibus Budget and Reconciliation Act[3] authorizes the Commission to award available 220 MHz spectrum through competitive bidding. PageNet disagrees with some commenters to the extent they claim that the Commission has no discretion under the Budget Act to hold competitive bidding to resolve mutually exclusive applications for nationwide noncommercial licenses.[4]

Section 309(j)(2) of the Communications Act,[5] as amended by section 6002 of the Budget Act, authorizes the Commission to assign the remaining 220 MHz spectrum through competitive bidding. The legislative history of that section states:

> Under the terms of the Conference Agreement, competitive bidding procedures would be utilized for a limited number of licenses. These procedures will only be utilized when the Commission accepts for filing mutually exclusive applications for a license, and the Commission has determined that the principal use of that license will be to offer service in return for compensation from subscribers.[6]

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3 107 Stat. 388 (1993) ("Budget Act").

4 See, e.g., Comments of MTEL Technologies, Inc.; Comments of UTC.

5 47 U.S.C. § 309(j)(2).

6 H.R. Conf. Rep. No. 213, 103d Cong., 1st Sess. 481 (1993)..

Thus, the Commission's authority to implement competitive bidding is circumscribed only by two factors: first, there must be mutually exclusive applications, and second, the Commission must have determined that the principal use of the spectrum is for compensation. Because it is clear that, under the proposed modifications to the regulations, 220 MHz licensees will have the option to engage in the provision of commercial mobile radio services, and because 220 MHz licensees will in fact engage in the provision of services for profit, the Commission can reasonably determine that the principal use of the spectrum will involve commercial, for-profit activities. To the extent to which there are mutually exclusive applications, then, pursuant to the Budget Act and its legislative history, competitive bidding is appropriate.

Any other means of distributing the remaining spectrum, other than by competitive bidding, will undermine the underlying goals of the Budget Act and the Communications Act. Section 309(j)(3)(A) of the Communications Act charges the Commission with promoting the "development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas, without administrative burden or delay." Neither lotteries nor comparative hearings satisfy this obligation. In the past, for example, lottery winners have not necessarily used the spectrum efficiently for the public good, nor have many of them endeavored to offer the service for which the spectrum has been licensed in the most expedient way possible. Comparative hearings, on the

other hand, generally are extremely slow and are often times subject to dilatory tactics.

B. It is within the Commission's Authority to Return Pending Applications.

Revision of the rules applicable to 220 MHz service compels the dismissal and return of pending applications which have become inconsistent by virtue of the new rules. As PageNet has advanced in its Comments, there is ample precedent and clear legal authority for the Commission to dismiss pending applications that are inconsistent with new Commission Rules.[7]

In Private Operational-Fixed Microwave Service,[8] for example, the Commission changed the applicable rules and consequently dismissed 1,400 applications and opened a new filing window. On appeal, the Court of Appeals for the District of Columbia Circuit affirmed the Commission's initial determination, and held that "in light of the substantial modifications [the Commission] had made to the conditions for issuance of [the licenses], return of pending applications and a new application period would serve the public interest."

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7 See Private Operational-Fixed Microwave Service, 48 Fed. Reg. 32,578 (1983), aff'd, Affiliated Communications Corp. v. FCC, No. 83-1686 (D.C. Cir. May 8, 1985) (unpublished decision). See also Maxcel Telecom Plus, Inc. v. FCC, 815 F.2d 1551, 1554 (D.C. Cir. 1987).

8 48 FR 32,578 (1983), aff'd, Affiliated Communications Corp. v. FCC, No. 83-1686 (D.C. Cir. May 8, 1985).

Moreover, it is within the Commission's authority to change the rules and apply them to pending applications. In Cellular Lottery Rulemaking,[9] the Commission applied the use of lottery for cellular applications already on file. In Hispanic Information,[10] the Court of Appeals permitted the Commission to modify its rules and apply them to pending applicants. In U.S. v. Storer,[11] the Supreme Court noted that the Commission's authority to establish eligibility standards by general rule may be exercised even where qualification changes affect pending applicants. As these cases suggest, it is within the Commission's authority to dismiss applications that have become inconsistent with the rules. The Commission should now look to its precedents and appropriately dismiss all pending 220 MHz applications and establish a new filing window.

The equities in this case also militate against retaining pending applications. Any decision not to establish a new filing window would have a preclusive effect upon those entities who would have filed their applications if the rules had been different. On the other hand, retaining pending applications would unjustly enrich pending applicants who, under the revised rules, would receive licenses that are far more valuable than previously anticipated.

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9 98 FCC 2d 175 (1984).

10 865 F.2d 1289 (D.C. Cir. 1989).

11 351 U.S. 192 (1956).

C. **The Commission is Authorized to Apply Modified Rules to Pending Applicants Retroactively Because there is No Cognizable Harm to Pending Applicants.**

PageNet disagrees with the commenters to the extent they suggest that the Commission cannot retroactively apply its proposed rules. Indeed, in the past the Commission has, where appropriate, applied its rules retroactively and the appellate courts have upheld such decisions.

In SEC v. Chenery, the Supreme Court held that retroactive enforcement of a rule is improper only if "the ill effect of the retroactive application" of the rule outweighs the "mischief" of frustrating the interests the rule promotes.[12] More recently, in Maxcell Telecom Plus, Inc. v. FCC,[13] the Court of Appeals for the District of Columbia Circuit applied the Chenery standard and found that the Commission's overriding concern with the efficient processing of the many applications before it for cellular radiotelephone licenses fully justified its retroactive use of lottery procedure to select applicants. The court further noted that the appellant did not suffer any significant injury from the retroactive effect of the lottery procedure that would warrant invalidation of the Commission's decision.

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12 SEC v. Chenery Corp., 332 U.S. 194, 203, 67 S.Ct. 1575, 1580 (1947).

13 815 F.2d 1551 (D.C. Cir. 1987).

In the instant case, the only harm that some of the commenters assert[14] are the resources that the pending applicants purportedly have expended in prosecuting their applications, none of which are compelling enough to justify a decision to reject competitive bidding. Under the proposed rules, applications fees will be returned to the applicants in the event the Commission chooses competitive bidding. Thus, those who do not wish to participate in competitive bidding will have the benefit of a refund, and those who wish to pursue competitive bidding can use their refunds to bid.

Similarly, the fact that some of the pending applicants have invested years and thousands of dollars in legal fees in connection with their applications, as some commenters assert,[15] does not by itself constitute the harm contemplated by the Supreme Court to outweigh the "mischief" of retroactivity. Indeed, in Maxcell, the appellant contended that the Commission's belated decision to implement a lottery in lieu of a comparative hearing caused it unnecessarily to incur the costs of filing a comparative application. The court summarily rejected the argument. Whatever resources the pending applicants may have expended in pursuing their applications are necessary costs of doing business and, hence, do not justify bullheaded adherence to random selection.

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14 See, e.g., Comments of PLMRS Narrowband Corp.; Comments of Columbia Cellular Corporation; Comments of MTEL Technologies, Inc.; Comments of Washington Legal Foundation.

15 See, e.g., Comments of PLMRS Narrowband, Corp.

On the other side of the Chenery balance is the question of whether retroactive application of the competitive bidding procedure furthers the purposes underlying implementation of competitive bidding. As discussed elsewhere, the legislative history of the Budget Act indicates a strong preference for competitive bidding in these circumstances:

> The Committee finds that in many respects the FCC's current licensing method for assigning spectrum have not served the public interest. Comparative hearings frequently have been time-consuming, causing technological progress and the delivery of services to suffer. Lotteries engendered rampant speculation; undermined the integrity of the FCC's licensing process and, more importantly, frequently resulted in unqualified persons winning an FCC license. Many lottery applicants had not intention to build or operate a system using the spectrum, but instead only sought to acquire a license at nominal cost and then sell it, making large profit and at the same time delaying the delivery of services to the public. . . . Spectrum is a scarce resource, and thus every exclusive license granted denies someone else the use of that spectrum. This is what give spectrum a market value. Because new licenses would be paid for, a competitive bidding system will ensure that spectrum is used more productively and efficiently that if handed out for free. . . . In addition to promoting efficient use of the spectrum the Committee also believes that rapid deployment of new technology should be encouraged. Use of competitive bidding will help accomplish that goal. . . .[16]

The goals sought to be accomplished by the legislature in amending the Communications Act will clearly be furthered by instituting competitive bidding to distribute the remaining 220

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16 H.R. Conf. Rep. No. 111, 103d Cong., 1st Sess. 248-249 (1993).

MHz spectrum.[17] In particular, because prospective licensees will have paid for their licenses, they will be encouraged to quickly and efficiently build their systems in order to get a return on their investment. From a competitive standpoint, adoption of competitive bidding will put all CMRS providers at competitive parity. Finally, competitive bidding will enable the citizens of the United States, through the U.S. Treasury, to collect some measure of value for the use of the public spectrum.

D. Competitive Parity Considerations Compel the Commission to Adopt Competitive Bidding.

Under the proposed rules, 220 MHz licensees can compete head-on with other commercial mobile radio services, such as paging and PCS. Because 220 MHz can effectively compete with other CMRS, it is only appropriate that these services have competitive parity. The failure to require nationwide noncommercial 220 MHz service licensees to pay for their license would create an enormous cost structure disparity between these licensees and other CMRS licensees, who have paid millions of dollars for their licenses. Giving 220 MHz licensees a free license would undermine competitive conditions in the CMRS marketplace by giving these licensees a tremendous cost advantage over similarly situated competitors. Thus, if these licensees are not required to pay for their licenses, their subscriber costs would be lower. Further,

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17 It is difficult to determine how many of the original applicants were "speculators." However, to the extent there may have been some speculators, the auction process will significantly diminish speculation.

because these licensees conceivably would not have to obtain debt financing to pay for their licenses, by allowing them to in effect obtain a free license, the Commission would be directly influencing the cost structure, the debt and equity structure, and the competitive outcome of CMRS.

The application fees that have been paid by the applicants to qualify for lottery are insufficient to put the CMRS licensees who paid hundreds of thousands (if not millions) of dollars for their licensees through auctions, at competitive parity with 220 MHz licensees who would get their licenses essentially for free. If the Commission's prior competitive bidding experiences are any indication, prospective 220 MHz licensees would willingly pay significant amounts of money for invaluable spectrum rights--far more than what they would have paid in lottery fees.

PageNet disagrees with those commenters who assert that, by distributing the spectrum through competitive bidding, the Commission is elevating revenue concerns over other public interest issues.[18] Indeed, in this instance, the implementation of a system of competitive bidding would function not as a revenue generator per se, but rather as a competitive catalyst.

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18 See, e.g., Comments of ComTech Communications, Inc.

E. Section 4(i) of the Communications Act Gives the Commission Independent Authority to Adopt Competitive Bidding.

The Commission has additional statutory authority to adopt competitive bidding in this instance. Section 4(i) of the Communications Act authorizes the Commission to

> perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.[19]

While the Commission cannot rely upon Section 4(i) to contravene an express prohibition or requirement of the Communications Act, the Commission may use this authority in this instance because nothing in the Communications Act expressly or implicitly precludes the Commission from adopting competitive bidding to distribute the subject spectrum. The remaining inquiry under section 4(i), then, is whether the action the Commission proposes to take "may be necessary in the execution of its functions." In the past past, section 4(i) has been used to justify Commission decisions that clearly were not within explicit grants of authority, where the decisions reasonably could be found to be "necessary and proper" for the execution of the agency's

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19 47 U.S.C. § 154(i).

enumerated powers.[20]

In Nationwide Wireless Network Corp.,[21] the Commission found authority under section 4(i) to condition a pioneer's preference applicant's license on the payment of a fee, noting, inter alia, that requiring payment is "necessary" in order to promote competition in the PCS arena. Here, as in Nationwide Wireless and its long line of precedents, the Commission can appropriately rely upon section 4(i) in order to carry out its public interest mandates. In particular, the Commission has an obligation to promote competition to the extent feasible and to take appropriate regulatory steps to ensure that competition is fair. In this case, granting 220 MHz licenses for free would not be in the

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20 See, e.g., Nader v. FCC, 520 F.2d 182 (D.C. Cir. 1975) (holding that an FCC order prescribing a rate of return for AT&T was in the public interest, necessary for the Commission to carry out its functions in an expeditious manner, and within its section 4(i) authority); Lincoln Telephone & Telegraph Co. v. FCC, 659 F.2d 1092 (D.C. Cir. 1989) (affirming an order of the Commission requiring a "connecting carrier" to file tariffs even though the Communications Act specifically exempted connecting carriers from the tariff filing requirements; North American Telecomm. Ass'n v. FCC, 772 F.2d 1282 (7th Cir. 1985) (holding that section 4(i), as a separate grant of power, authorized the Commission to require the Bell holding companies to file capitalization plans for subsidiary companies organized to sell telephone equipment); New England Telephone & Telegraph Co. v. FCC, 826 F.2d 1101 (D.C. Cir. 1987) (holding that section 4(i) could be relied upon to require AT&T to refund rates it had collected in excess of its authorized rate of return).

21 Application of Nationwide Wireless Network Corp. for a Nationwide Authorization in the Narrowband Personal Communications Service, Memorandum Opinion and Order, 9 FCC Rcd 3635 (1994).

public interest because such a grant would create a competitive imbalance in the CMRS marketplace. Moreover, implementation of competitive bidding in this instance would assure rapid and efficient deployment of 220 MHz services. In view of the public interest goals of, inter alia, promoting competitive parity as well as expediting the delivery of service to the public, the Commission may rely upon section 4(i) to implement a system of competitive bidding.

III. THE COMMISSION SHOULD AMEND THE RULES TO ALLOW 220 MHZ LICENSEES TO SUCCESSFULLY COMPETE IN THE CMRS MARKETPLACE.

A. The Commission Should not Impose Limits on Aggregation.

In the Third NPRM, the Commission proposed to allow licensees of contiguous 220 MHz spectrum to aggregate their channels for wider bandwidth service offering. PageNet wholeheartedly supports this proposal and concurs with many commenters who assert that limits on aggregation restrict the commercial viability of the spectrum and prevent 220 MHz licensees from competing with other CMRS providers.[22]

B. The Commission Should Remove Current Restrictions Against Paging Operations.

A number of commenters support the Commission proposal to remove the current restriction against paging operations in the

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22 See, e.g., Comments of US Mobilecomm, Inc.

220 MHz band.[23] PageNet concurs with ComTech's assertion that the removal of this restriction will allow licensees to respond to market demands.[24] In addition, PageNet believes that prospective 220 MHz licensees should have enough flexibility to introduce new and advanced services, using the 220 MHz spectrum, without violating their authorizations. Moreover, any such service limitation effectively discourages entrepreneurial or innovative providers from maximizing the use of their channels.

C. **There Should be No Set-Aside for Noncommercial Channels.**

In the Third NPRM, the Commission tentatively concluded that there should be no set-aside for noncommercial channels and that the remaining nationwide noncommercial channels should be made available to all applicants regardless of planned use. PageNet continues to support this proposal. PageNet concurs with US MobilComm, Inc.'s observation that the spectrum is developing into commercial-use spectrum.[25] PageNet agrees that immediate reallocation of the spectrum for commercial use would avoid a de facto commercial allocation. PageNet opposes Ericsson Corporation's recommendation that the Commission allocate two nationwide 10-channel blocks for CMRS purposes and one nationwide

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23 See, e.g., Comments of Global Cellular Communications, Inc.; Comments of ComTech Communications, Inc.

24 See Comments of ComTech Communications, Inc.

25 See Comments of US MobilComm, Inc.

10-channel block for PMRS purposes.[26] Such a proposal would severely affect the number of channels available for commercial use and, consequently, hamper potential licensees' ability to own and/or aggregate available spectrum.

IV. CONCLUSION

PageNet applauds the Commission's efforts to develop an appropriate regulatory framework for 220 MHz service. The Commission should go forward with its proposals and, consequently, encourage the development of the service. The Commission has the authority to implement competitive bidding for the purpose of distributing the available spectrum. The Commission should adopt its proposed rules and initiate competitive bidding at once.

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26 See Comments of Ericsson Corporation.

For all the foregoing reasons and those set forth in its Comments, PageNet respectfully urges the Commission to modify the rules that are currently applicable to 220 MHz service, and implement a system of competitive bidding, as proposed.

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October 12, 1995

CERTIFICATE OF SERVICE

I, Regina Alston, hereby certify that I have on this 12th day of October, 1995, caused to be served a copy of the foregoing Reply Comments of Paging Network, Inc., upon the following, by first class mail, postage prepaid, unless otherwise indicated:

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